In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-162

WARREN J. WEITZEL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Subject Index

Table of Authorities Cited

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner Warren J. Weitzel respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Weitzel v. National Labor Relations Board,* No. 75-2539 in that court.

PROCEEDINGS BELOW

The decision of the Court of Appeals is not reported. The memorandum signed by Circuit Judge Goodwin and District Judge East and the dissenting opinion of Circuit Judge Hufstedler are appended to this petition as Appendix "A". The order of the Court of Appeals

denying a petition for rehearing and a rehearing *en banc* is not reported and is attached to this petition as Appendix "B". The "Supplemental Decision And Order" of the National Labor Relations Board is appended to this petition as Appendix "C" and reported at 218 NLRB No. 32. The "Supplemental Decision" of the administrative law judge acting for the National Labor Relations Board is appended to this petition as Appendix "D".

The earlier decision of the National Labor Relations Board in *Shell Oil Company v. Warren J. Weitzel* is reported at 186 NLRB 941 and was filed on November 30, 1970. This decision and order was ordered enforced by the United States Court of Appeals for the Ninth Circuit. (461 F.2d 1264.) These decisions are not reproduced as they have no relevance to the issue involved in the supplemental proceeding.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1977 and that Court entered a further order denying petitioner's timely petition for rehearing on April 12, 1977. The Honorable William H. Renquist, Associate Justice of this Court, entered an order extending the time in which petitioner could file his petition for writ of certiorari to and including July 29, 1977. This Court's jurisdiction is found in 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Exercising its remand powers under §10(e) and (f) of the National Labor Relations Act (29 U.S.C. §160(e) and (f)), does a Court of Appeals abuse its discretion in denying remand for additional evidence when that evidence is "material" under §10(e), and when the failure to adduce it was the result of the gross negligence of the government counsel presenting the evidence to support a backpay award?

2. Must a Court of Appeals expressly pass upon a request for a §10(e) remand, or is it sufficient to deny the request *sub silentio* without mentioning the materiality of the proffered additional evidence, the reasonableness of the grounds for the failure to adduce such evidence or the factors influencing the discretionary denial?

STATUTES INVOLVED

The "remand powers" of the Courts of Appeals in National Labor Relations Act cases is found in the following portion of 29 U.S.C. §160(e):

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

The General Counsel of the NLRB furnishes counsel for the presentation of the case for a backpay award to a discriminatee under the Act pursuant to 29 U.S.C. §153(d):

> "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * * ."

STATEMENT OF THE CASE

On January 29, 1969, petitioner held a position as a surveyor with the Shell Oil Company for whom he had worked since 1937. On that date he was illegally discharged and he was not reinstated by Shell until August 4, 1972. The reinstatement was the result of proceedings before the National Labor Relations Board instituted by petitioner. The Board found that petitioner had been discharged in violation of §8(a)(1) of the National Labor Relations Act and ordered Shell to make petitioner whole for his losses resulting

from its unfair labor practice. (186 NLRB 941 (1970).) This decision of the Board was enforced by the United States Court of Appeals for the Ninth Circuit. (461 F.2d 1264 (1971).)

Controversy having arisen concerning the amount of backpay due petitioner, the Board issued its "Backpay Specification And Notice Of Hearing" (Tr. Vol. I, p. 3) setting a hearing on the backpay obligation and alleging that Shell owed petitioner $31,181.67 plus interest and adjustments for various fringe benefits. Shell Oil Company filed an answer to the Specification (Tr. Vol. I, pp. 10-13) denying any backpay obligation and claiming that petitioner's resignation from an interim job as a pipefitter at a United States Navy facility at Mare Island, California, which he held for 2½ months in 1969, was a willful failure to mitigate damages entitling Shell to credit for the amounts which petitioner would have earned had he stayed in such employment. There is no evidence that petitioner had any other significant employment or opportunities for employment during the 2½ years he remained wrongfully discharged from Shell's employment.

On October 31, 1974, a hearing was held before an administrative law judge on the issue of backpay entitlement. Shell Oil Company was present by counsel, counsel for the General Counsel of the National Labor Relations Board was present, and petitioner was personally present without individual counsel. Counsel for the General Counsel was evidently appearing pursuant to statutory authority found in 29 U.S.C. §153(d) to present the Board's position on petitioner's

entitlement to backpay.[1] Under circumstances to be described, petitioner did not testify at this hearing; nor did any witness testify on behalf of petitioner. Petitioner was prepared to testify, wanted to testify and had prepared documentary evidence in support of his backpay claim. The only issue at the hearing was whether petitioner's potential earnings, had he not resigned his interim employment as a pipefitter at the Naval Station at Mare Island, should be credited to Shell's backpay obligation. Respondent Shell Oil presented several witnesses at the hearing concerning petitioner's statements at the time of that resignation.

The "Supplemental Decision" of the administrative law judge (Appendix "D"), after a general discussion of the law concerning mitigation and reciting the dictionary descriptions of "pipefitter" and "surveyor," states:

> "Within this general framework the essential issue is whether the pipefitter position at Mare Island was unsuitable or amounted to interim employment which could be quit for justifiable reason. *All that is known* of Weitzel's specific motivation in submitting the resignation of June 2, 1969, is contained in Roberts' [one of respondent's witnesses] record of contemporaneous utterence." (Appendix D, p. xxi, emphasis added.)

Based upon the record before him, the administrative judge concluded that the resignation of the employment as a pipefitter was a willful loss of suitable interim earnings which, when applied to the backpay

[1]A reporter's transcript of this proceeding was before the Court of Appeals as Vol. II of the transcript of record.

claim, resulted in no backpay due from Shell Oil to petitioner.

The General Counsel's counsel filed exceptions to this decision. (Tr. Vol. 1, pp. 38-42.) Petitioner, evidently acting *pro se,* filed two sets of exceptions to the administrative law judge's decision. (Tr. Vol. 1, pp. 33-37; Tr. Vol. I, pp. 31-32.) These exceptions tell the story of the mishandling of petitioner's case by the counsel for the General Counsel of the National Labor Relations Board which is the meat of this Petition. NLRB officials informed petitioner that it was unnecessary to present witnessees and that the trial judge would not allow any such testimony. (Tr. Vol. I, p. 33.) They explained to him that "if anything brought up by respondent [Shell] was in need of refutation, a continuance could be, and would be requested, and the necessary witnesses could be called for further sessions." *(Id.)* Concerning the hearing itself:

> "I wasn't highly concerned about Roberts' testimony, it said nothing about real or ficticious reasons about my resignation and I was confident I would be called to correct what distortions there were. * * * There was no way, as far as I knew, I could force myself upon the court. The hearing came to an unexpected end—as far as I was concerned—both attorneys agreeing to rest if the other would. Roberts' false 'memorandum' and distorted testimony went into the record unchallenged." (Tr. Vol. I, p. 34.)
>
> * * *
>
> "I had compiled and documented pages of information on my reasons for leaving the Mare

Island job. This information had been furnished to the Compliance Office of Region 20." (Tr. Vol. I, p. 34.)

Petitioner was clearly under the impression that he had to abide by the strictures of the general counsel:

> *"Had I been allowed to testify* I would have given testimony which—true and accurate—would have differed sharply with the testimony of both Mr. R. P. Sheradon and Mr. Listo. * * * Counsel for the general counsel realizing something was bothering me to a great extent, (What was bothering me was the fact no one seemed to know what they were talking about.) [sic.] asked the judge to let me speak, 'off the record.' Why off the record I do not know. I was kept at arm's length during the entire proceedings." (Tr. Vol. I, pp. 36-37.)

The Board's Supplemental Decision and Order (Appendix "C") affirmed the decision of the administrative law judge with a minor exception. It held that the resignation of petitioner from his interim job was "unjustified under the circumstances."

Petitioner retained private counsel and challenged the NLRB decision in the Court of Appeals. Petitioner argued that on the record presented the Board decision should have been in his favor, and he also argued in the alternative that there ought to be a §10(e) remand in line with the decision of the United States Court of Appeals for the Third Circuit on the duties of the General Counsel in *Swinick v. NLRB* (1975) 528 F.2d 796. (See petitioner's Reply Brief, p. 21; petitioner's Petition for Rehearing, p. 8.)

In the Court of Appeals, the General Counsel of the NLRB submitted a brief supporting the Board's decision and Shell's position and *criticizing itself* for the General Counsel's failure to call petitioner to the stand at the hearing! (Board Brief, p. 12, note 13.)

The opinion for the majority in the Court of Appeals entirely ignores the remand provision of §10(e) and does not rule one way or the other on it. On the merits, it holds that the NLRB had not abused its discretion in finding that failure of petitioner to retain his job as pipefitter could be used to offset any damages due petitioner from the wrongful termination of his employment by Shell Oil Company. The majority specifically rests its decision on the failure of the General Counsel to refute Shell's prima facie case:

> "In view of the General Counsel's failure to offer any rebuttal evidence, the Board could reasonably find that the Company had established its case by a preponderance of the evidence." (Appendix "A", pp. v-vi.)

Dissenting Judge Hufstedler would have remanded for further proceedings under §10(e) to allow additional evidence on the issue of whether the job as a pipefitter was comparable to petitioner's former job with Shell as a surveyor.[2]

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[2]Petitioner's Court of Appeals brief shows that the testimony he wished to give at the administrative hearing was that his job for Shell was as a land surveyor, where as at Mare Island he was required to do arduous pipefitting in a submerged, damaged submarine. He was 56 years old at the time and could not continue this labor. The record before the Court of Appeals was so sparse that the majority assumed erroneously that petitioner had been a *marine* surveyor.

REASONS FOR GRANTING THE WRIT

1. A PRIVATE PARTY'S RIGHT TO PRESENT EVIDENCE AND BE FAIRLY HEARD ON A CLAIM TO BACKPAY AFTER AN ILLEGAL DISCHARGE MUST NOT BE FORECLOSED BY THE NEGLIGENCE OF GOVERNMENT COUNSEL WHO ASSUMES THE ROLE OF THE PARTY'S ADVOCATE.

The failure of the General Counsel to present petitioner's case in line with any standard of competence expected of an advocate is a reasonable ground for remand. A decision by this Court is necessary on this point to protect the rights of individuals before the National Labor Relations Board and other government agencies against being steamrollered by inadequate government counsel who either put the interests of their agencies ahead of the individuals for whom they assume an adversary role or ignore the individuals' interests because they do not sense a responsibility to protect them.

On each occasion when the transcript of the hearing of petitioner's entitlement to backpay has been reviewed, it has been concluded that the counsel for the General Counsel failed to present material and essential evidence to support his backpay claim. The petitioner himself was of that opinion and so stated in his Exceptions which we have referred to above. (Tr. Vol. I, p. 33.) The administrative law judge commented that the only evidence available to him concerning petitioner's reasons for leaving his interim employment was a statement one of Shell's witnesses testified that petitioner made to him. (Appendix D, p. xxi.) The brief which the National Labor Relations

Board filed in the Court of Appeals[3] states that the Board decision is correct because the General Counsel failed to have the discriminatee testify. (Brief for the NLRB, p. 12, note 13.) Shell Oil Company, appearing as Intervenor in the Court of Appeals, argued in its brief that all of the evidence petitioner discussed in his opening brief concerning the interim position which he left must be ignored since it is not contained in the record. (Intervenor's Brief, p. 26.)[4]

Lastly, the opinion below for the majority expressly rests upon the General Counsel's "failure to offer any rebuttal evidence . . . ." (Appendix A, p. v.)

The evidence was available since petitioner was at the hearing, expected to testify and had spent a good deal of time in assembling documents on the subject. It is obvious that the evidence which petitioner wanted to present was material as its very absence was the reason for the decision below. The issue is reasonable grounds for failure to adduce it.

This Court has commented previously on the administration of the remand powers of §10(e) of the Act.

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[3]We find it puzzling that the same General Counsel who argued before the Administrative Law Judge that petitioner should receive his full back pay less only his *actual* earnings from the pipefitting job, filed a brief in the Court of Appeals stating that the Board was entirely correct in denying all backpay to petitioner. This switch in position raises numerous questions appropriate to the consideration of the ethical responsibilities of advocates.

[4]Petitioner in the Ninth Circuit attempted to argue that there was sufficient evidence in the record from which the Court of Appeals could decide that the Board was in error; however, most of the evidence relied upon was outside the record and its recitation was also aimed at making a case for the taking of additional evidence.

The most apt statement of the duty of the Courts of Appeals under this section is found in *NLRB v. Indiana and Michigan Electric Company* (1943) 318 U.S. 9, 28:

> But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the Court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support its findings, is heard and weighed.

Other instances where this Court has reviewed the exercise of discretion under the remand powers of §10(e) of the Act are *NLRB v. Pittsburgh Plate Glass* (1940) 313 U.S. 146; *Southport Petroleum Company v. NLRB* (1942) 315 U.S. 100; and *NLRB v. Donnelly Garment Company* (1947) 330 U.S. 219. In none of these cases was the exercise of discretion by the Court of Appeals disturbed.

A more appropriate exercise of discretion by a Court of Appeals where the NLRB General Counsel has negligently handled a case is found in the holding of the Third Circuit in *Swinick v. NLRB* (1975) 528 F.2d 796. The petitioner in the *Swinick* case asked

that an order of the NLRB be reviewed and set aside, which order dismissed her charge of an unfair labor practice against her employer. Without reaching the issue of whether the Board findings were supported by substantial evidence, the case was remanded for additional evidence pursuant to §10(e).[5]

After a discussion of the materiality of the evidence which the petitioner sought to adduce, the *Swinick* court turns to the question of whether there were reasonable grounds for failure to adduce this evidence. In answering this question in the affirmative, it relied heavily upon the duty of the General Counsel of the NLRB to present the case:

> "Petitioner relied heavily on the General Counsel to present her case. Petitioner testified that the attorney representing the General Counsel had advised her that they would take care of the entire conduct of the litigation. * * * She was unfamiliar with the procedures of an unfair labor practice case and was without counsel. Prior to the hearing, she wrote to the General Counsel and requested that three Union representatives and Marlene Kimbell be subpoened as witnesses and the petitioner's address book containing the signatures of 50 employees be placed in evidence at the hearing. * * * General Counsel did not subpoena the Union officials and refused to enforce the subpoena against Kimbell when she

[5] An appeal challenging the NLRB order is filed with the Court of Appeals under §10(f) of the National Labor Relations Act. Section 10(f) incorporates by reference the remand procedures set forth in §10(e). See *Amalgamated Utility Workers v. Consolidated Edison Company* (1940) 309 U.S. 261, 266; *Swinick v. NLRB* (3rd Cir. 1975) 528 F.2d 796, 800, note 8.

failed to appear at the hearing." (528 F.2d at 801.)

The General Counsel in the *Swinick* case at least called the petitioner and one other witness in support of her case (528 F.2d at 801, Note 17), whereas in our case the General Counsel did not call the petitioner or any other witness. The *Swinick* court concluded that under the circumstances there were reasonable grounds for the failure to adduce the material evidence at the hearing.

This Court has not passed upon the duties of the General Counsel of the National Labor Relations Board, or, indeed, other government counsel, under such circumstances. The issue obviously has important ramifications in an era of increasing government intervention to protect private rights.

The Courts of Appeals have touched upon this issue with regard to the General Counsel of the NLRB and have imposed a high standard of competence on such counsel. In *NLRB v. Selwyn Shoe Manufacturing Corporation* (1970) 428 F.2d 217, the General Counsel had refused to turn over certain evidence in his possession to opposing counsel. The court held the General Counsel to "responsibility beyond that of a mere adversary. As a public official he has a duty and obligation to be fair to all parties and not to knowingly suppress relevant evidence." (428 F.2d at 225.) In *Phillip Carey Manufacturing Co. v. NLRB* (6th Cir. 1964) 331 F.2d 720, the question was whether the General Counsel could strike the names of four

charging parties from the complaint over the objection of the remaining charging parties. The holding was in the affirmative, the Court stating:

> "The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants." (331 F.2d at 734.)

In *NLRB v. Kohler Co.* (7th Cir. 1955) 220 F.2d 3, the issue was whether the complaint filed by the General Counsel must be limited to the charges filed by the charging parties. The Court ruled no, stating:

> A major reason for having the General Counsel of the Board take over and try the charging parties' case is to make it possible for single employees to enforce their rights in an area where that takes considerable money and experience." (220 F.2d at 20.)

We think it clear that petitioner in his briefs to the Ninth Circuit demonstrated without question that evidence which would have been provided by the petitioner had the General Counsel not handled the case with gross negligence, could well have changed the result of his case. This Court should decide if such derilictions must be suffered without remedy by petitioner and others similarly situated.

2. MUST THE COURTS OF APPEALS EXPRESSLY PASS UPON REMAND REQUESTS MADE UNDER §10(e) OF THE NATIONAL LABOR RELATIONS ACT?

The majority in the Court below did not pass upon petitioner's request for remand, although the dissenting judge indicated that she would have granted the request, at least in part. We know that Congress intended that the exercise of discretion by the Courts of Appeals with regard to the remand powers under §10(e) should be reviewable by this Court. Yet unless a Court of Appeals gives its reasoning on the issues of materiality of the evidence sought to be adduced on remand and the reasonable grounds for the failure to adduce it at the administrative hearing, such review is difficult.

It is true that the manner in which §10(e) is written could indicate a grant of absolute discretion to the Courts of Appeals, but that is not the way this Court has interperted the section when occasion for review has arisen previously. (See the cases cited at p. 12, *supra.*)

We believe that whatever the strength of a case presented by a petitioner, the Court of Appeals has an obligation to pass upon his request by expressly granting or denying it. Certainly this question is an important one in the administration of the Act. Of course, it is impossible to determine how many Courts of Appeal deal with §10(e) requests for remand by ignoring them or denying them *sub silentio.* However, the administration of the Act is not served by such a procedure.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, Kentfield, California,
July 27, 1977.

MARSHALL W. KRAUSE,
Attorney for Petitioner
Warren J. Weitzel.

KRAUSE, BASKIN & SHELL,
ALBERT J. KLEIN,
Of Counsel.

(Appendices Follow)

APPENDICES

Appendix A

(Do Not Publish)

United State Court of Appeals
for the Ninth Circuit

No. 75-2539

Warren J. Weitzel, an individual,
Petitioner,
vs.
National Labor Relations Board,
Respondent.

[Filed Feb. 22, 1977]

On Petition to Review a Decision of the
National Labor Relations Board

MEMORANDUM

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and EAST,* District Judge

Weitzel appeals the Board's order determining that Weitzel incurred a willful loss of earnings by leaving interim employment without just cause. We enforce the order.

Weitzel, age 57, was employed by the Shell Oil Company (Company) in its maritime section for 21

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

years (14 years as a pipe fitter and the last seven as a surveyor). Weitzel was discharged by the Company on March 17, 1969. Two days after the discharge, Weitzel took a job as a pipe fitter at the Mare Island Naval Shipyard. Two and a half months later Weitzel quit the job under the assertion that he wished to avoid excessive overtime and look for surveyor's work. During the next three years, Weitzel earned in wages the sum of $104.96.

The Board, on Weitzel's complaint, ultimately held the discharge of Weitzel to be an unfair labor practice on the part of the Company and ordered a hearing on the amount of allowable back pay due Weitzel.

An Administrative Law Judge (ALJ) held an evidentiary hearing to determine allowable back pay to Weitzel and found Weitzel was unjustified in quitting his job as a pipe fitter at Mare Island and concluded that no back pay was due. The Board adopted the findings of the ALJ as to the lack of justification for Weitzel's having voluntarily quit his interim job and made only a slight adjustment in the back pay order.

We place the issues on review as:

(1) Did the Board err in concluding that Weitzel's back pay award should be reduced because he incurred a willful loss of earnings in that he quit a suitable interim job without just cause?

(2) Did the Board erroneously place the burden on Weitzel to prove that he quit with just cause rather than on the Company to prove that there was a willful loss of earnings?

Issue 1:

In attempting to make whole an employee for losses suffered due to an employer's unfair labor practice, the Board is to make deductions "for losses which [the worker] willfully incurred" by a "clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 198-200 (1941). The deductions are permitted "not so much [for] the minimization of damages as [for] the healthy policy of promoting production and employment," *id.* at 200, and only secondarily to remedy individual economic loss and prevent unfair windfalls, *N.L.R.B. v. Madison Courier, Inc.,* 505 F.2d 391, 398 (D.C. Cir. 1974). "It [has been] accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or *voluntarily quits alternative employment without good reason." N.L.R.B. v. Mastro Plastics Corp.,* 354 F.2d 170, 174 n.3 (2d Cir. 1965), *cert. denied,* 384 U.S. 972 (1966). (Emphasis supplied).

When Weitzel voluntarily obtained the interim job with Mare Island, the Board's standard in determining whether Weitzel's subsequent resignation involved a willful loss of income was premised on the nature of the interim job itself and the reasons for his resignation. *Knickerbocker Plastics Co., Inc.,* 132 NLRB 1209, 1214-15 (1961). The factors to be considered are: (1) That the job paid wages comparable to the

one held with the original employer; (2) That it was suited to persons of the employee's skill and experience; (3) That it did not appear to be more burdensome than the one held with the original employer; and (4) That the employee did not have sufficient and justifiable cause for quitting the job (*i.e.,* that he quit for reasons of personal convenience, preference or accommodation rather than necessity). Thus, where a discriminatee accepts an interim job that is not more dangerous or burdensome or essentially different, he may not quit "without good reason." *Mastro Plastics Corp., supra,* at 174 n.3.

Weitzel argues that pipe fitting is not substantially equivalent to surveying and that, therefore, absent the application of the lowered sights doctrine, he had an absolute right to quit his interim employment. *N.L.R.B. v. Madison Courier, Inc.,* 472 F.2d 1307 (D.C. Cir. 1972), and 505 F.2d 391 (D.C. Cir. 1974), makes clear the so-called lower sights doctrine is not applicable to Weitzel's situation. The Board's standard permits a discriminatee who is seeking interim employment, at least for a reasonable period of time, to confine his search to jobs which are substantially equivalent to that which the offending employer denied him, *N.L.R.B. v. Madison Courier, Inc., supra,* 505 F.2d at 402. On the other hand, after the discriminatee takes a suitable interim job, he may not quit that job without just cause. *Knickerbocker Plastics Co., Inc., supra.* The *Madison Courier* cases make clear that the class of suitable interim jobs is broader than the class of substantially equivalent jobs.

It is manifest from the evidentiary record that the pipe fitter position taken by Weitzel was suitable interim employment which he could not quit, absent just cause, without incurring a willful loss of income. The evidentiary record is devoid of the exact quantum of past experience required for the position of surveyor of ship's fittings. However, the clear rational inference from the evidence before the Board is that the expertise of a qualified pipe fitter (a position in which Weitzel had 14 years experience) is essential for the position of a qualified surveyor, and in that respect the positions are comparable. The record also discloses that at the Mare Island facility, a surveyor draws a rate of pay comparable to that drawn by a pipe fitter. Further, the Board's findings that Weitzel's pipe fitting position with Mare Island was not more burdensome than his surveyor's position and that Weitzel voluntarily terminated his interim employment merely to avoid an increased income tax burden are fully substantiated by the evidence of record and must be respected. *Florence Printing Company v. N.L.R.B.,* 376 F.2d 216, 221 (4th Cir. 1967).

Issue 2:

Weitzel's argument with regard to this issue is untenable. A review of the evidentiary record establishes that the Company made a prima facie showing that Weitzel's interim job was suitable and that he terminated that employment without just cause. In view of the General Counsel's failure to offer any rebuttal evidence, the Board could reasonably find

that the Company had established its case by a preponderance of the evidence. *N.L.R.B. v. Decker,* 322 F.2d 238, 247 (8th Cir. 1963); and *Law v. N.L.R.B.,* 192 F.2d 236, 238 (10th Cir. 1951).

The order of the Board issued on May 29, 1975 in cause No. 20-CA-5619 is enforced.

AFFIRMED.

HUFSTEDLER, Circuit Judge, dissenting:

I dissent from the majority view on the sole ground that the record does not support the Board's determination that the pipefitter position taken by Weitzel was a "suitable interim job." It is entirely possible that the position of marine surveyor and the position of pipefitter are so far comparable that suitability is appropriate; however, the record does not reveal the factors which would permit a determination of comparability. Accordingly, I would remand to the Board for the sole purpose of permitting the record to be amplified on the comparability issue.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2539

Warren J. Weitzel, an individual,
Petitioner,
vs.
National Labor Relations Board,
Respondent.

[Filed Apr. 12, 1977]

On Petition to Review a Decision of the
National Labor Relations Board

ORDER

Before: HUFSTEDLER and GOODWIN, Circuit Judges,
and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Hufstedler and Judge Goodwin have voted to reject the suggestion for a rehearing en banc. Judge East recommends against a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix C

United States of America
Before The National Labor Relations Board

Case 20-CA-5619

Shell Oil Company
and
Warren J. Weitzel, an Individual

SUPPLEMENTAL DECISION AND ORDER

On November 30, 1970, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] directing Respondent, *inter alia,* to make whole Warren J. Weitzel for his losses resulting from unfair labor practices committed by Respondent in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the Ninth Circuit.[2]

Pursuant to a backpay specification and appropriate notice issued by the Acting Regional Director for Region 20, a hearing was held on October 31, 1974, before Administrative Law Judge David G. Heilbrun for the purpose of determining the amount of backpay due the discriminatee.

On January 8, 1975, the Administrative Law Judge issued the attached Supplemental Decision. There-

[1]186 NLRB 941.
[2]461 F.2d 1264 (1972).

after, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and supporting letters,[3] and the Respondent filed a brief in answer to exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as herein modified.

We are in agreement with the Administrative Law Judge that Weitzel's quitting of his interim employment at Mare Island Naval Shipyard was unjustified under the circumstances and that his projected interim earnings, had he retained that employment, should be considered, along with the early retirement benefits he received from Shell, in computing the amount by which the backpay due him from Respondent was offset. We also believe that, in the absence of a more comprehensive accounting of the funds to which Weitzel might have been entitled from the Provident Fund, the amounts which would have been put into the fund in Weitzel's account in each quarter, had Weitzel had not been discharged,

[3]The request by the Charging Party for oral argument is hereby denied as the record, including the briefs, adequately presents the issues and positions of the parties.

should be added to the gross backpay due him for each of those quarters In computing these amounts, we use the figures shown in the backpay specification and Respondent's Exhibit 5, which the Administrative Law Judge accepted as a correct compilation of backpay figures to be considered. We note that in 1969, quarter II; 1971, quarter I; 1972, quarter I; and 1972, quarter II, the gross backpay due plus the amount which should have been contributed to the Provident Fund exceeds the sum of the projected interim earnings and the early retirement benefit received, by the following amounts for the respective quarters: $8,61, $45.01, $65.51 and $9.51. Computing backpay on a quarterly basis[4] we find that Weitzel is entitled to these amounts, which total $128.64, plus interest at the rate of 6 percent per annum,[5] and shall order that Respondent reimburse Weitzel in that amount.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Shell Oil Company, Martinez, California, its officers, agents, successors, and assigns, shall:

1. Pay to the discriminatee, Warren J. Weitzel, as net backpay the amount of $128.64.

2. In addition to the above amount, pay interest at the rate of 6 percent per annum computed on the

[4] *F. W. Woolworth Company*, 90 NLRB 289 (1950).
[5] *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

basis of each quarterly amount of net backpay due, less any tax withholding required by law.

Dated, Washington, D.C. May 29 1975

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member
(Seal) National Labor Relations Board

Appendix D

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case No. 20-CA-5619

Shell Oil Company
and
Warren J. Weitzel, An Individual

Donald R. Rendall, for the
General Counsel.

Jonathan H. Sakol, San Francisco,
Calif., for Respondent.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge: On September 12, 1972, the United States Court of Appeals for the Ninth Circuit entered Judgment enforcing the Board's reported Decision and Order[1] in this matter. Controversy having arisen over the amount of backpay due Warren J. Weitzel under the terms of this Decision and Order, the issues

[1] *Shell Oil Company,* 186 NLRB 941 (decided November 30, 1970).

raised in a backpay specification issued October 3, 1974 and answered October 24, 1974 were heard as supplemental proceedings[2] at Martinez, California, on October 31, 1974.

Upon the entire record in this case, including my observation of the witnesses, and upon consideration of briefs filed by General Counsel and Respondent, I make the following:

Findings of Fact

Weitzel's backpay period commences March 17, 1969. On March 19, 1969, he was employed by Mare Island Naval Shipyard as a pipefittter at $4.08 per hour. On June 2, 1969, Weitzel resigned the position giving "wish employment commensurate to my training [and] education as surveyor" as the reason. Respondent's former employee relations representative Hugh Roberts testified that on June 3, 1969 Weitzel came into his office incident to the return of equipment and a brief conversation ensued. Several minutes after Weitzel's departure Roberts prepared a memorandum of the conversation which reads in part:

> "[M]r. Weitzel stated that he had resigned from his pipefitter's job at Mare Island; his reason being the excessive pressure towards overtime work (12 hours a day, 7 days a week) due to repairs on the submarine that had recently sunk. He said his basic desire had been to get into surveyor type work at Mare Island, but felt that

[2] The transcript is corrected as requested by Respondent in its unopposed motion.

it would take him three or four years and he didn't want to wait that long. He also stated that acceptance of this overtime did create problems regarding his income tax.'"[3]

R. P. Sheridan, head of personnel operations division at Mare Island, testified that pipefittter positions were continually open for the period June 2, 1969 through July 31, 1972, and the hourly rate increased in stages to $5.43.[4] As an "open" position persons responsible for recruitment were "looking for" pipefitters during the stated period. The position of surveyor at Mare Island Naval Shipyard is classified GS-7, the equivalent rate for which was approximately 72% of that hourly rate associated with the pipefitter classification there from March 1969 through July 1972.

Weitzel did not testify. For six (or seven) years before being discharged he had been "sole incumbent" of the surveyor position on Respondent's survey team. During the prior fourteen years Weitzel had been, successively, a pipefitter helper (four years) and a pipefitter (ten years) with Respondent. The surveyor position at Respondent's facility carried a higher rate of pay as compared to pipefitter there. General Counsel pleaded the receipt of $28.91 in net interim

[3]Pursuant to a retirement application signed "under protest" by Weitzel, a Statement of Settlement relative to the Shell Provident Fund dated April 24, 1969, showed the amount of a settlement check as $34,513.58 with $23,344.32 of this figure subject to federal income tax. In addition monthly retirement benefits of $216.13 were paid commencing February 1969.

[4]The hourly rate progression to $5.43 incorporates two "step" increments at six-month intervals measured from March 1969.

earnings by Weitzel during 1971. The backpay period ends July 31, 1972, when Weitzel resumed employment with Respondent.

Conclusions

Mitigation of damages, for which the burden of proof rests on Respondent,[5] is the issue of these supplemental proceedings. While the original proceeding established the commission of unfair labor practices for which Respondent, as a "wrongdoer," must be accountable under the terms of remedial action ordered and enforced, this does not affect classic mitigation principles that have been broadly established and consistently applied by the Board. The most common instance calling for application of such principles is either the situation of a discriminatee obtaining interim employment which is then relinquished during the backpay period or failing to obtain employment (or sufficiently remunerative employment) during the period. The claim of mitigation here is "willful loss of earnings" from and after June 2, 1969. Respondent argues that leaving the Mare Island job was without "sufficient or just cause" and, in the alternative, that Weitzel was obligated to "lower his sights" after a reasonable time following the Mare Island employment and "accept other available work as a pipefitter."

An individual's aptitude, education, experience, training, motivation and personal mobility ordinarily forms a composite tending to affect success, or lack

[5]*N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454.

thereof, in the attainment of interim employment. Prevailing labor market factors also impinge importantly on whether a job is obtained by one so seeking with reasonable diligence. The success attaching to an employment search may be fortuitous; however, once a job is assumed the focus becomes that of the job's content and why, when no longer held, a discontinuance occurred. Chief among the factors to be examined is general suitability, in terms of whether the individual should have retained the employment as a substantial means of earning livelihood while unremedied unfair labor practices continued to exist.

In *Kartarik, Inc.,* 111 NLRB 630 the Board adopted findings that a discriminatorily discharged die and tool maker be subjected to an exclusion of gross backpay because of quitting "certain employment" at St. Paul, Minnesota and leaving for California "to see his mother and to obtain employment more in accordance with his skills" when, admittedly, "work closer to his skills was available in the St. Paul area at that time."[6]

In *East Texas Steel Castings Company, Inc.,* 116 NLRB 1336 the Board rejected a contention of willful losses where quitting of employment was for "justifiable personal or other reason." The "personal" reason was quitting a 32-hour week job in preference for a 6-day week one, while the "other" reason was simply that the discriminatee experienced layoff.

[6]The exclusion of gross backpay for the quarter involved resulted in an excess of net interim earnings over gross backpay.

Knickerbocker Plastic Co., Inc., 132 NLRB 1209 examined the action of ten individuals who assertedly lost earnings willfully.[7] Circumstances related to the quitting of jobs by voluntary choice or in the context of transportation problems and distasteful job conditions. The Board held each individual had quit "without compelling or justifying means." The claimant's status was summarized with language concluding that none of the jobs quit appeared "more burdensome" than those previously held nor "unsuited to persons of the claimants' skill and experience." In no case had a claimant quit employment "for sufficient and justifiable cause" but instead each appeared "motivated more by personal convenience, preference, or accommodation than by necessity or difficulties inherent in the jobs which they quit." It was expressly noted that the jobs had "paid wages at least comparable to the ones they had held with [Knickerbocker]."[8] The Board wrote in further part:

[7]Respondent relies extensively on *Knickerbocker* in support of its primary contention. *American Bottling Company,* 116 NLRB 1303 and *Ozark Hardwood Company,* 119 NLRB 1130 are also cited. The former of these involves a harsh pronouncement that willful loss of earnings was incurred by a discriminatee domiciled in Corpus Christi, Texas, who obtained higher-paying interim employment in Chicago, Illinois which he quit under circumstances deemed "a choice of his own making" for which he should "bear the consequences of his choice."

[8]Respondent compares the ratio of Weitzel's Mare Island earning rate to gross backpay (84% based on hourly wage of $4.08 from March 17, 1969 to June 2, 1969, and $842 monthly salary for the same period) with the facts of *Knickerbocker,* stating that only two of the ten claimants there had a higher interim earnings ratio (Resp. Br. 8). The reference for such assertion is six pages of Appendix in *Knickerbocker* where substituted backpay schedules are set forth with the "offset" deductions applied to reflect willful losses for the ten claimants (other than Zamora) named at page 1215. In fact, Respondent's character-

> "On this record, we cannot mitigate the backpay damages by finding that these jobs were unsuitable ways of earning a living, or that the claimants were justified in quitting them with no prospect of other employment. Once these claimants had obtained jobs, they could not voluntarily relinquish such employment under the circumstances herein involved without incurring what constitutes a willful loss of earnings for the period subsequent to their quitting." (p. 1215)

In *Miami Coca-Cola Bottling Company,* 151 NLRB 1701 the Board held that quitting a driver-salesman job where final earnings were "almost equal to his [former] base pay" was not justified by conditions of the claimant's truck engine running hot and that the employer failed to provide a sufficient quantity of merchandise for his route's needs.

In *The Madison Courier, Inc.,* 180 NLRB 781 the Board adopted language describing the conditional significance of jobs within the labor market area of discriminatees as "[C]omparable to, but not identical

ization is inaccurate and fails to take into account particularized factors and fluctuation in such schedules. While claimants Granados and Kadi did exceed an 84% ratio in certain quarters, so did Muller and Hamilton at 86% and 85% for quarters 1952/IV and 1953/II, respectively. A more realistic analysis is to select quarters for each of the *Knickerbocker* claimants nearest to commencement of the backpay period, if such quarter appears free of extraneous factors. Doing this for Granados, Kadi, Blakemore, Granata, Ramirez, Contreras and Corrao yields pertinent earnings ratios of 98%, 93%, 80%, 76%, 70%, 69%, and 49% for quarters 1952/II, 1952/IV, 1952/IV, 1952/IV, 1954/IV, 1952/II, and 1955/I, respectively (plus Muller and Hamilton described separately above). The median of these is 80% and the arithmetic mean 78%. As so refined the motion of "comparable" earnings at interim employment, expressly noted by the Board in *Knickerbocker,* displays a preponderance favoring this branch of Respondent's argument here.

with, the jobs held by the claimants at the Madison Courier prior to the strike with respect to wages, hours, and other conditions of employment, as well as the amount of physical effort required to perform them and the degree of personal satisfaction and status in the community they afforded to their holders.'"[9]

It is evident the Board expects discriminatees to prudently retain such interim employment as is secured. Excusable exception keys most frequently to the term "unsuitable;" ordinarily applied to mean unprestigious, annoying jobs or those certain to create unacceptable disruption to the discriminatee's private life.[10] Weitzel's former work as a surveyor "nor-

[9]In its Second Supplemental Decision and Order in *Madison Courier* (202 NLRB 808) the Board dealt only with remanded issues not pertaining to a quitting of interim employment. On October 11, 1974, the Circuit Court of Appeals for the District of Columbia remanded the case a second time in an action relied on by Respondent relative to its alternative contention that Weitzel should have "lower[ed] his sights" and accepted available pipefitter work by no later than October 17, 1969. The Court's opinion treats the "lower sights" doctrine finding it grounded in *N.L.R.B. v. Southern Silk Mills, Inc.,* 242 F.2d 697, cert. den., 355 U.S. 821 and *N.L.R.B. v. Moss Planing Mill Co.,* 224 F.2d 702 but relevant only insofar as discriminatees would first be accorded a reasonable time within which to search for work in the industry of their primary skills. *N.L.R.B. v. The Madison Courier, Inc.,* 87 LRRM 2440, 2449.

[10]In *Lozano Enterprises,* 152 NLRB 258, a skilled linotype operator was justified in quitting janitorial work paying less than half his former weekly wages. In *John S. Barnes Corporation,* 205 NLRB No. 94 discriminatees permissibly quit jobs where one was made "nervous" by his foreman and the second experienced "too difficult a pattern of life for himself and his "family" on an unaccustomed shift (each had obtained substitute employment without a break in normal work days, thus clouding the precise significance of these holdings). See also *Winn-Dixie Stores, Inc.,* 170 NLRB 1734, 1744; *Artim Transportation System, Inc.,* 193 NLRB 179, 183.

mally [involved] operating the surveying instruments, recording data, and making the necessary calculations." 186 NLRB at 943. An illustrative survey activity was "[S]ecuring several elevations and fixing several benchmarks requested by the California Bureau of Reclamation in order to plan a proposed 60-inch pipe line across the refinery property to bring water from the Sacramento River to the Martinez reservoir." *Id.* During Weitzel's unavailability throughout the 1969 strike period, a slight amount of survey work was performed by a junior draftsman. No facts of record are available as to the surveyor position supposedly aspired to at Mare Island or the pipefitter positions formerly held by Weitzel at Respondent and at Mare Island. These occupations have, however, been descriptively defined as follows:

> "Surveyor—Surveys earth's surface . . . determining exact location and measurements of points, elevations, lines, areas and contours of earth's surface to secure data used for construction, mapmaking, land valuation, mining, or other purposes. Calculates information . . . keeps accurate notes . . . surveys earth's surface, using surveying instruments and verifies . . . accuracy of survey data secured." *U.S. Department of Labor,* Vol. I, "Dictionary of Occupational Titles," Third Edition (1965), p. 717.
>
> "Pipe Fitter, Maintenance (any industry)—Determines defects in and maintains piping systems for steam, gas, water, air, acid, and paints in industrial or commercial establishments . . . reads blueprint or schematic drawings to determine work aids and procedures . . . measures, cuts, threads, and installs pipes, valves, gages, and other fixtures, using handtools [and machines]." *Id.,* p. 535.

The occupation of surveyor tends to defy stereotyping. Obviously some physical exertion and manual dexterity is involved; however intellectual requirements are clearly present as well as willing ability to work in close coordination with others of a small group. Functionally it is often an integral phase of civil engineering. Rate of remuneration, the most visible measure of employment skills, showed higher valuation than for pipefitter at Respondent's facility but a lower comparative one at Mare Island.[11]

Within this general framework the essential issue is whether the pipefitter position at Mare Island was unsuitable or amounted to interim employment which could be quit for justifiable reason. All that is known of Weitzel's specific motivation in submitting the resignation of June 2, 1969, is contained in Roberts' record of contemporaneous utterance.[12] Two reasons were understood to exist. The first, "excessive pressure towards overtime work," was clearly job-related yet did not manifest as a burdensome factor or im-

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[11]As a position within federal service at Mare Island, the earnings of a surveyor position were governed by placement within the general schedule rather than as a "recognized" trade or craft. Allocation to the GS-7 level embodied the formal assessment that a Mare Island surveyor position included performance of "work . . . in a professional, scientific or technical field [or] requiring professional, scientific or technical training; and, to a limited extent, the exercise of independent technical judgment." 5 U.S.C.A. ¶ 5102(c)(7), § 5104(7), ¶ 5341.

[12]The resignation occurred one day before formal filing of the original charge in this proceeding, a fact harmonizing with Roberts' notes of Weitzel saying his "unfair labor practice claim [was] activated."

mediately impinging on Weitzel's ability to remain in this employment.[13] The second recorded reason dealt with tax consequences from interim earnings, a clearly impermissible influence under the duty to mitigate. See *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197-200.

There remains the narrower question of whether the pipefitter position was intrinsically unsuitable and a continuing potential, which Weitzel happened to exercise on June 2, 1969, was present for it to be yielded up without disadvantaging this claim. As a recognized trade or craft pipefitting involves manual effort of varying degree and the display of craft skills.[14] On a cultural scale no known aspersion exists as to group it with "menial"[15] occupations, nor was it in a labor market area geographically inconvenient to Weitzel.[16] While Weitzel was 56 years of age at the time, there is no claim that pipefitter duties

[13]"Pressure" (to work overtime) is a nebulous term best clarified by the pressuree. The notion involved is that of voluntary versus non-voluntary overtime. Here Roberts' notes allude to a prospective 84-hour workweek, yet the parties are in agreement that Weitzel worked only a "normal" 40-hour week throughout his Mare Island employment (G.C. Exh. 1(c)—Appendix; Resp. Exh. 3).

[14]Cf. *Teamsters, Local No. 612*, 202 NLRB 924.

[15]A characterization of the janitor and dishwasher positions involved in *Lozano*, left unmodified by the Board's general adoption of Trial Examiner conclusions (152 NLRB at 264).

[16]The repseptcive localities of former employment and the Mare Island interim employment are the California cities of Martinez and Vallejo, respectively. An approximate travelling distance between them is 10 miles, crossing the Sacramento River by toll bridge. While interim expenses are scheduled in offset of earnings at Mare Island, no other assertion is raised respective to the differing locale. A majority of Mare Island employees commute to work from distances in excess of 15 miles (Tr. 40).

at Mare Island were unduly arduous or beyond his personal capacity to fulfill. On the contrary the position was pointedly appropriate to his own occupational background. The total situation fails to reveal that justifiable cause existed for Weitzel to quit this employment. His voluntary cessation of gainful work in the slender hope of securing preferred survey employment, with undenied overtones that leisure rather than labor would afford financial advantage, marks the action as a willful loss of earnings deemed to reduce further backpay by the measure of non-mitigation. *Mastro Plastics Corporation, Etc.*, 136 NLRB 1342, 1350; *Gary Aircraft Corporation*, 211 NLRB No. 65. Considering the credible testimony of Sheridan that pipefiitters were both employed and sought continuously during the claimed backpay period, Respondent correctly calculates the willful loss in its Exhibit 5 (column headed "Projected Interim Earnings") based on the arithmetic reconstruction of its Exhibit 3. Thus, for each of the calendar quarters existing in full or part during the claimed backpay period (subsequent to June 2, 1969) the amount of quarterly willful loss plus sums received as "Early Retirement Benefits" exceeds gross backpay. The consequence is a determination that no backpay is due Weitzel relative to the pleaded controversy.[17]

[17]General Counsel argues that a principle exists which cloaks the quitting of employment with presumptive justification. (G.C. Br. 3.) No satisfactory authority is advanced for the proposition. It can only be assumed as an attempted restatement of doctrine charging Respondent with meeting a burden of proof without lingering "uncertainties in the record." *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 575-576; *McCann Steel Company, Inc.*, 212 NLRB No. 39.

In so concluding Respondent's subsidiary contention is not reached. The "lower(ing) of sights" rationale relates to sufficiency of the search for employment, encouraging preservation of skill and training when there is risk these might be "prejudice[d]" by "more readily" available work opportunities of an alternative character.[18] Further, the doctrine addresses the dilemma of whether to accept a position of limited remuneration which mitigates so ineffectually that continuing to actively seek jobs is the wiser course. An equivalent suitability exists here between the surveyor and pipefitter occupations. Once the latter was secured the viable issue remaining surrounds motivation for resigning. This obviates consideration of testimony from placement official Brian Listoe that pipefitter jobs were in continual demand at institutional employers of the Martinez-Vallejo labor market area during the claimed backpay period.

Finally Respondent argues that Weitzel owes it sums that are cognizable in this supplemental proceeding. The basis of this assertion is the swing from plus to minus net backpay totals, by quarter, resulting from monthly receipt of $216.13 in early retirement benefits. The backpay specification concedes the offsetting effect of these payments, but no reason is present to accept the unprecedented notion of a discriminatee being held financially liable to a Respondent because of dealings between them or extra-

[18]Maintenance of fullest craft proficiency was emphatically preferred in the context of "a highly complex and constantly changing industry" present in *Madison Courier* (202 NLRB at 811, 812).

neous payments received by the discriminatee. Adjustments which are narrowly identified in lieu of earnings are properly deductable; beyond that Respondent has no standing to ask for beneficial relief.[19] The scope of this proceeding ends with the question of what amount, if any, Respondent shall now pay out in remedial satisfaction of the "loss of earnings' provision contained in paragraph 2(a) of the Board's Order.

The backpay specification sought further pecuniary relief in terms of "emoluments" attached to former employment, cash surrender value of the Provident Fund stock portfolio and indemnification relative to Federal Insurance Contribution Act credits. The first two subjects were obliquely abandoned as a matter of colloquy during hearing (Tr. 56, 57), the third[20] evolved to a bare request for protective order relative to conjectural future events (Tr. 78, 79) and none of the points was briefed by General Counsel. Under the

[19]To the extent that workmen's compensation payments reflected "replacement of lost wages" they were included with interim earnings in *American Mfg. Co. of Texas*, 167 NLRB 520. Analogous reasoning was used to credit the amount paid under a settlement and release termed "not legally binding" to adjust plaintiff's recovery in a Fair Labor Standards Act case. *Baker v. California Shipbuilding Corporation*, 73 F. Supp. 322, 6 WH Cases 1004. Early retirement payments would not have been made, or at least not in the configuration or time frame involved, but for Respondent's unlawful conduct. Respondent's claim is repugnant to basic purposes of this adjudication.

[20]A technique superficially similar to this subject was that devised to cause an "attempt" at procuring restoration of pension rights by late tender of contributions. *Artim, supra* (at 185). The typical manner of spreading retroactive F.I.C.A. contributions was not developed here and my view of the basic controversy means that no such credit will arise.

circumstances I see no adequate basis to expand on traditional approaches to the computation of net backpay in formal supplemental proceedings.

Disposition

Upon the foregoing findings, conclusions, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

SUPPLEMENTAL ORDER

Warren J. Weitzel is due no backpay from Respondent.

Dated: Jan 8 1975

/s/ David G. Heilbrun
David G. Heilbrun
Administrative Law Judge

[21]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Supplemental Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Supplemental Order, and all objections thereto shall be deemed waived for all purposes.

No. 77-162

In the Supreme Court of the United States

OCTOBER TERM, 1977

WARREN J. WEITZEL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. i-vi) is not officially reported. The decision and order of the National Labor Relations Board are reported at 218 NLRB 87 (Pet. App. pp. viii-xxvi).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1977. On June 14, 1977, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 29, 1977. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals abused its discretion in failing to grant petitioner's motion for remand to introduce further evidence in the instant Board backpay proceeding.

STATUTORY PROVISIONS INVOLVED

Section 10(e) of the National Labor Relations Act ("Act"), 61 Stat. 147-148, as amended, 29 U.S.C. 160(e), provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * *

STATEMENT

In an unfair labor practice proceeding, the Board determined that Shell Oil Company (the Company) had unlawfully discharged petitioner from his position as a surveyor. The Board ordered petitioner's reinstatement with backpay. 186 NLRB 941. The court of appeals enforced the Board's order. 461 F. 2d 1264. Thereafter, the instant backpay proceeding was brought to determine the amount of backpay owed to petitioner.

In the backpay proceeding, the Company contended that petitioner was not entitled to the backpay claimed because he had quit suitable interim employment, thereby incurring a willful loss of earnings. The Company presented the following evidence in support of this contention:

On March 19, 1969, two days after petitioner's discharge, he took a job as a pipefitter at Mare Island Naval Shipyard (Pet. App. p. xiii).[1] His hourly wage at Mare Island was 84 percent of what he had earned at the Company, and, with his monthly pension from the Company, he was receiving about 110 percent of his former earnings with the Company (Pet. App. p. xvii, n. 8; Vol. I, pp. 4, 11; Company Exhs. 3, 5).[2] On June 2, 1969, he quit the

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[1]Before his discharge, petitioner had worked as a surveyor for the Company for seven years. During the fourteen years preceding that period, petitioner had worked for the Company as a pipefitter (Pet. App. p. xiv).

[2]After his discharge, petitioner received monthly early retirement benefits in the amount of $216.13 per month (Pet. App. p. xiv, n. 3).

"Vol. I" references are to the papers designated as "Volume I, Pleadings" and filed with the court of appeals; "Vol. II" references

Mare Island job (Pet. App. p. xiii). The records at Mare Island indicated that petitioner said he quit because he "wish[ed] employment commensurate to [his] training [and] education as surveyor" (*ibid.*).

On June 3, 1969, petitioner spoke to Company employment relations representative Roberts and told him that he had quit his job at Mare Island for several reasons, including his desire to get into surveying work[3] and his reluctance to work overtime because overtime pay would increase his tax liability.[4] (Pet. App. pp. xiii-xiv.)

During the three years until his reinstatement at the Company, Weitzel earned a total of only $104.96 (Pet. App. p. ii). For the whole backpay period Mare Island had continuous openings for pipefitters, and there was a continual demand for pipefitters by other employers in the area (Pet. App. p. xiv; Vol. II, pp. 34-37).

At the backpay hearing, the General Counsel took the position that petitioner, by quitting his job as a pipefitter, had not forfeited his entitlement to backpay. The General Counsel argued that the Company had not met its burden of proof with respect to its contention that pipefitting

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are to the transcript of the backpay hearing, filed with the court of appeals as "Volume II, Transcript."

[3]Petitioner told Roberts that he would have had to wait three or four years to obtain a surveying job at Mare Island (Pet. App. pp. xiii-xiv). Although surveying jobs at the Company paid wages higher than those earned by pipefitters working for the same employer, surveying positions at Mare Island paid only about 80% of what was paid to pipefitters there (Pet. App. p. xiv; Vol. II, p. 38).

[4]Petitioner had also received a lump sum payment of retirement benefits from the Company which, along with a property sale, greatly increased his tax liability for 1969 (Pet. App. p. xiv, n. 3; Vol. II, p. 65).

was suitable interim employment.[5] On January 8, 1975, the Administrative Law Judge (ALJ) ruled in the Company's favor. Both the General Counsel and petitioner filed exceptions to the ALJ's decision. Petitioner asked that "the judge's decision be set aside and a new hearing ordered because the judge used material not submitted at the hearing, refused to consider evidence made available at the hearing, and did not insist all evidence be exposed to the one most concerned" (Vol. I, p. 37); at no point, however, did he state specifically what his testimony would have been had he taken the witness stand.[6]

On May 29, 1975, the Board unanimously affirmed the ALJ's decision with slight modifications not relevant here (Pet. App. pp. viii-xi). Petitioner retained counsel, but made no motion for rehearing or reopening of the record under Board Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.48(d). The court of appeals affirmed the Board's decision (Pet. App. pp. i-vi). The court held that, on the basis of the record, the Board could reasonably find that the Mare Island pipefitting job constituted suitable interim employment which petitioner could not quit without just cause.[7]

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[5]The General Counsel presented a backpay specification at the hearing, but neither the General Counsel nor petitioner presented further evidence after the Company presented its affirmative case. Petitioner was present at the hearing, but was not represented by independent counsel at that time.

[6]Petitioner asserted only that he would have discussed certain matters regarding the tax liability arising from his receipt of lump sum retirement benefits (Vol. I, p. 36; n. 4, *supra*).

[7]Judge Hufstedler dissented on the "sole ground" that the record did not support the finding that the Mare Island job was suitable interim employment. Judge Hufstedler would have remanded the case to the Board for further hearing "on the comparability issue" (Pet. App. p. vi). Petitioner sought rehearing *en banc*, arguing *inter*

ARGUMENT

Section 10(e) of the National Labor Relations Act states that the court of appeals "may order * * * additional evidence to be taken before the Board" if the petitioning party "show[s] to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." This Court has held that a motion under Section 10(e) is "addressed to the sound judicial discretion of the court." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104. Reversal of the court of appeals in such a case requires that this Court find not only error, but an abuse of judicial discretion. This Court has noted that "[u]ndoubtedly, an element of fair judicial discretion vested in the court below consists of respect for a wide range of discretion in the Board itself * * *." *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 16, 27. The court of appeals did not abuse its discretion in refusing to remand this case to the Board. Moreover, the court's ruling necessarily turned on the particular facts here presented and, accordingly, does not warrant review by this Court.[8]

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alia that if the court would order the Board to hold a new hearing, evidence could "be presented as to exactly what petitioner was required to do in that interim job" (Weitzel Petition for Rehearing, p. 6). The judges on the panel (including Judge Hufstedler) voted to reject the suggestion for a rehearing *en banc*, and the senior district judge sitting by designation recommended against such a rehearing; no active court of appeals judge requested a vote of the full court on the matter. (Pet. App. p. vii.)

[8]Petitioner argues (Pet. p. 16) that the court of appeals abused its discretion by failing to rule explicitly on petitioner's remand motion. This contention is incorrect. "[T]he determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with granting the relief sought." *Wimberly* v. *Clark Controller Company*, 364 F. 2d 225, 227 (C.A. 6). See also *Butterman* v. *Walston & Co.*, 50 F.R.D. 189, 191 (E.D. Wisc.); *In re S.F. Brothers Co.*, 151 F. Supp. 157, 159 (E.D. Mich.). Here the court of appeals' decision enforcing the Board's order clearly implied rejection of petitioner's belated motion for a remand.

Although petitioner complains that he was denied an opportunity to present certain evidence, he has not described the content of the evidence or testimony he wished to present.[9] Absent such an offer of proof, the Board had insufficient basis upon which to order a reopening of the record and hearing. Petitioner had the opportunity to secure counsel following the issuance of the ALJ's decision and, in fact, did retain an attorney after the Board issued its decision and order. Even after consulting with counsel, petitioner failed to petition the Board for rehearing or for reopening the record. Petitioner also failed to identify any relevant facts of which the Board was uninformed or which it did not consider. The court of appeals could reasonably conclude that petitioner did not have reasonable grounds for failing to adduce material evidence before the Board.

Indeed, in his opening brief in the court of appeals, petitioner did not suggest returning the case to the Board. Rather, he urged the position which the General Counsel had unsuccessfully maintained before the Board,[10] namely,

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[9]Petitioner's exceptions to the ALJ's decision made only general representations that he would have "correct[ed] what distortions there were" in the testimony of one Company witness and "would have given testimony which—true and accurate—would have differed sharply with the testimony" of two other witnesses (Pet. pp. 7-8; Vol. I, pp. 34, 36, 37).

[10]There is no merit to petitioner's contention (Pet. 3) that government counsel was guilty of "gross negligence" in presenting the General Counsel's case in the backpay proceeding. On cross-examination of a Company witness, counsel for the General Counsel developed the fact that pipefitting was strenuous work. Counsel for the General

that the Company had not demonstrated that the Mare Island pipefitting job constituted suitable interim employment. In light of petitioner's extensive pipefitting experience, and the substantial rate of remuneration provided by the Mare Island job, the court of appeals properly upheld the Board's suitability finding. As the court observed, "the class of suitable interim jobs is broader than the class of substantially equivalent jobs" (Pet. App. p. iv).

After petitioner's exceptions to the ALJ's decision, the possibility of a new hearing was not raised again until petitioner filed his reply brief in the court of appeals—more than seven months after petitioner initially sought review of the Board's order. Even then, no specific offer of proof was made to the court, and no reasons were given for the failure of petitioner to make such an offer to the Board at any time following the ALJ's decision. Instead, petitioner merely stated (Reply Br. 21):

> If this Court considers it necessary to take additional evidence on any issue raised below, * * * then we respectfully request that the Court consider this to be a motion for an order remanding the case to the Board for the purpose of taking additional evidence.

In these circumstances, the court of appeals did not abuse its discretion in declining to order a remand.[11]

Counsel contended that the Company had not made a *prima facie* showing that such work was "suitable" and therefore that petitioner's quitting of that job had not jeopardized his backpay award. Indeed, in his reply brief, after noting record evidence as to the strenuousness of pipefitting jobs, petitioner stated to the court of appeals that "it is understandable that the General Counsel did not put [petitioner] on the stand to testify as to just how strenuous and burdensome it was." (Reply Br. 20.)

[11] *Swinick* v. *National Labor Relations Board*, 528 F. 2d 796 (C.A. 3), on which petitioner relies (Pet. pp. 12-14), is factually distinguishable. In *Swinick*, the petitioner, appearing *pro se* at an unfair labor practice proceeding, had actively sought to present certain evidence. The ALJ denied petitioner the opportunity to present the proffered evidence, but ruled in petitioner's favor on the merits. The Board reversed the ALJ's determination on the merits, relying *inter alia* on the lack of corroboration of petitioner's testimony. Petitioner specifically applied to the court of appeals for leave to adduce additional evidence, and stated with particularity what evidence she wished to produce. In those circumstances the court of appeals found that since the proffered evidence had been rejected by the ALJ and could have resulted in a different decision by the Board, a reopening of the hearing was warranted. Here, however, petitioner made no specific offer of proof either to the Board or to the ALJ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

DOJ-1977-09

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-162

WARREN J. WEITZEL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief of Respondent/Intervenor Shell Oil Company

In Opposition To Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals abused its discretion under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), when, although not specifically requested to do so, it failed to remand this case to the National Labor Relations Board for the taking of further evidence, evidence not demonstrated to have been material or reasonably omitted from prior proceedings?

STATEMENT OF THE CASE

In 1969, Petitioner Warren J. Weitzel's ("Weitzel") employment was terminated by Shell Oil Company ("Shell")[1] under a Shell retirement program. Weitzel filed a complaint with the National Labor Relations Board ("the Board"), alleging that Shell had committed unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended ("the Act"), in connection with his retirement. Among other things, he sought to recover and, by virtue of an order issued by the Board on November 30, 1970 (186 N.L.R.B. 941), affirmed by the Ninth Circuit Court of Appeals on June 28, 1972 (461 F.2d 1264), did recover, backpay for the period between his retirement and his reinstatement.

On October 31, 1974, a hearing was held before an NLRB Administrative Law Judge in a supplemental proceeding to determine the amount of backpay, if any, due Weitzel as a result of his termination. Shell was represented at that hearing by its attorney, counsel for the Board's General Counsel was there, and Weitzel was there.[2] Counsel for the General Counsel claimed that Weitzel was entitled to a minimum of $31,181.67 in backpay, plus interest at six percent. Shell insisted that it owed Weitzel nothing, not only because during the period between his retirement and his reinstatement he had received monthly pension benefits plus payments from the Shell Provident Fund totaling

1. Shell was the respondent in the original proceeding before the National Labor Relations Board and it was granted leave to participate as an intervenor in the proceedings before the Ninth Circuit Court of Appeals.

2. While Weitzel was not represented by counsel at this hearing, he knew that he could have been because he had had his own counsel in the prior unfair labor practice proceeding.

$43,807.17, but also because he had obtained and then quit suitable interim employment without justifiable cause, thereby incurring a willful loss of earnings. (Tr. Vol. I, pp. 3-5, 10-13, 22; Vol. II, pp. 3, 7.)[3]

With respect to its claim of willful loss of earnings, Shell established that on March 19, 1969, two days after the backpay period began, Weitzel found and accepted employment as a pipefitter at Mare Island Naval Shipyard. While Weitzel had been a surveyor at Shell for seven years prior to his retirement, for the 14 years prior to that—ten as a journeyman and four as a helper—he had been a pipefitter. His hourly wage at Mare Island was 84% of his hourly wage at Shell. With his monthly pension from Shell he was actually making 110% of what he had been making at Shell. (Tr. Vol. II, pp. 34, 38, 60-61; App. D, pp. 1-2.)

Nevertheless, he quit his job at Mare Island effective June 2, 1969. Mare Island's records disclosed that Weitzel told them he quit because he "wish[ed]" employment commensurate with his training and education as a surveyor, although he apparently had nothing in mind at the time. The following day, Weitzel told Shell's official Roberts that he had two reasons for quitting his job. One was that he had taken the pipefitter job at Mare Island with the basic desire of getting into surveyor-type work (a fairly incredible statement since surveyors at Mare Island were being paid 80% of what pipefitters were getting), but he felt it would take him three or four years and he didn't want to wait that long. The other reason he gave was that he was being pressured to work overtime because of repairs on a submarine that had recently sunk and acceptance of this

3. Citations to "Tr. Vol. I [II or III] ...." refer to the record on appeal filed with the Ninth Circuit Court of Appeals; "App. A [B, C, or D]" refer to the Appendices to Petitioner's Petition For A Writ of Certiorari.

overtime would create income tax problems for him. In the next three years, Weitzel earned a total of only $104.96, and Shell had only one inquiry about him from a prospective employer, an inquiry in the middle of 1970 (a full year after he left Mare Island) from Contra Costa County where Weitzel had applied for a job, not as a surveyor, but as an Engineering Aid. (Tr. Vol. II, pp. 14-17, 33-34, 38-39, 59-60, 75; App. D, pp. 1-2.)

Shell contended that with 14 years' experience as a pipefitter, Weitzel should not have left his job as a pipefitter at Mare Island because of the possible income tax increases that might flow from staying on that job, because of some vague desire to find surveyor's work with nothing specific in mind, or because of some other reason of personal convenience, and that he incurred a willful loss of earnings by so doing. The Administrative Law Judge agreed:

> "[The pipefitter] position was pointedly appropriate to his own occupational background. The total situation fails to reveal that justifiable cause existed for Weitzel to quit his employment. His voluntary cessation of gainful work in the slender hope of securing preferred survey employment, with undenied overtones that leisure rather than labor would afford financial advantage, marks the action as willful loss of earnings deemed to reduce further backpay by the measure of nonmitigation." (App. D, p. 7, ll. 10-16)

Counsel for the General Counsel and Weitzel on his own behalf immediately filed exceptions to that decision with the Board, contending in essence (1) that the Administrative Law Judge applied the wrong standard of law applicable to abandoning interim employment; (2) that the finding of the Administriatve Law Judge that Weitzel incurred a willful loss of earnings when he quit his interim employ-

ment was not supported by the record; and (3) that the Administrative Law Judge erroneously placed the burden of proof with respect to willful loss of earnings on the General Counsel. No request was made by either Weitzel or the General Counsel that the Board reopen the hearing for additional evidence and no suggestion was made that material evidence had, for whatever reason, not been brought forward. Indeed, the only reference to "other evidence" is found in a cryptic exception to the Administrative Law Judge's finding that pressure to work overtime was a factor in Weitzel's decision to quit Mare Island which Weitzel said was "not supported by evidence available to [him] at the hearing." (Tr. Vol. I, pp. 31, 38-42.)[4]

The Board reviewed the Administrative Law Judge's decision and, in its Decision and Order of May 29, 1975, agreed that Weitzel's quitting of interim employment was unjustified under the circumstances and that his projected interim earnings should be considered as an offset in computing backpay due him from Shell:

> "We are in agreement with the Administrative Law Judge that Weitzel's quitting of his interim employment at Mare Island Naval Shipyard was unjustified under the circumstances and that his projected interim earnings, had he retained his employment, should be considered, along with the early retirement benefits

4. On January 26, 1975 Weitzel wrote a lengthy letter to the Board complaining of the credibility of Shell's witnesses and of the Administrative Law Judge's lack of common sense, and pointing out that he had not been represented by counsel although acknowledging that he knew he could have been. On January 31, 1975, the Board returned this letter to him, advising him that it would not accept it as a bill of exceptions since it failed to comply with the Board's rules. Weitzel then filed his exceptions dated February 7, 1975. It is this January 26 letter, however, which is not and never has been a part of the formal record, that Petitioner repeatedly cites to the Court in his Petition for a Writ of Certiorari as his bill of exceptions.

> he received from Shell, in computing the amount by which the backpay due him from Respondent was offset." (App. C, p. 2, ll. 7-12)

Recomputing backpay, the Board concluded that Weitzel was entitled to a net of $128.64. (App. C, pp. 2-3.)

Weitzel appealed to the Ninth Circuit, this time with an attorney representing him. He made precisely the same contentions to the Ninth Circuit which had been made by the General Counsel to the Board. Again, Weitzel argued that the Administrative Law Judge (and now the Board) applied the wrong standard of law applicable to abandoning interim employment; that the finding of the Administrative Law Judge (and now the Board) of a willful loss of earnings was not supported by the record; and that the Administrative Law Judge (and now the Board) erroneously placed the burden of proof with respect to willful loss of earnings on him. (Petitioner's Opening Brief to the Ninth Circuit, pp. 8-36.)

Weitzel did not argue to the Ninth Circuit that he had been inadequately represented by the General Counsel (or, indeed, that the General Counsel had a duty to represent him at all); he did not claim that material evidence had been omitted from the record that would have affected the outcome of the Administraitve Law Judge's and the Board's decisions; and he did not request that the court remand the matter to the Board for the purpose of taking additional evidence. Instead, in his Reply Brief his attorney advised the Ninth Circuit that, although it had the authority to order a new hearing if it considered the record inadequate: *"That is not Weitzel's argument here.* We believe the record is ample to show that [the Mare Island pipefitter's job] was not 'substantially equivalent' to surveying

and that, hence, Weitzel was not required by law to retain it." (Petitioner's Reply Brief, p. 20, emphasis added.)

The Ninth Circuit concluded that the record was more than adequate to uphold the Board's decision that Weitzel had voluntarily terminated suitable interim employment without just cause, and on February 12, 1977 it so held. On April 12, 1977 it denied Weitzel's Petition for Rehearing and for Rehearing En Banc and, on April 20, 1977, judgment was entered enforcing the Board's Supplemental Order.

Weitzel is now before this Court urging it to issue a Writ of Certiorari based on the assertion that the case involves two important questions of federal law that have not been, but should be, settled by this Court. The first question, he says, is whether a Court of Appeals abuses its discretion in denying a remand for additional evidence under § 10(e) of the National Labor Relations Act when that evidence is material, and when the failure to adduce it was the result of gross negligence of the government counsel presenting the case. The second question, he says, is whether a Court of Appeals must pass expressly on a request for a § 10(e) remand rather than denying the request *sub silentio.*

Neither of these questions, however, has anything to do with this case.

ARGUMENT

I. Petitioner Never Requested the Court of Appeals to Remand This Matter Under § 10(e)

Section 10(e) of the Act states in pertinent part:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is

> material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record." (29 U.S.C. § 160(e).)

While Weitzel's Petition to the Court is replete with jurisprudential outrage that the Ninth Circuit could fail to remand this matter to the Board to adduce additional evidence in light of what he feels was the obvious negligence of the General Counsel, the fact remains that he never asked the court to do so until *after* the Ninth Circuit had determined to enforce the Board's order. (Petitioner's Petition for Rehearing, p. 8.)[5] At that point, the boat had sailed.

5. Because Weitzel never applied to the Ninth Circuit for leave to adduce additional evidence, his reference to *NLRB v. Indiana and Michigan Electric Company*, 318 U.S. 9 (1938); *NLRB v. Pittsburgh Plate Glass Company*, 313 U.S. 146 (1941); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942); and *NLRB v. Donnelly Garment Company*, 330 U.S. 219 (1947), is meaningless, for in each of those cases a petition to remand under § 10(e) had been formally submitted to the appellate court. The appellate courts in *Pittsburgh Plate Glass* (*supra* at 155), in *Southport* (*supra* at 102-104), and in *Donnelly Garment Company* (*supra* at 225), *denied* the petitions to remand and those denials were upheld by this Court. In *Indiana and Michigan Electric Company, supra*, the Sixth Circuit granted the employer's § 10(e) petition to remand an unfair labor practice proceeding to the Board in which the employer had been charged with, and found guilty of, assisting a company-dominated union in opposition to unionizing efforts by the IBEW. The employer sought to offer evidence (which had developed *subsequent* to the unfair labor practice hearing) concerning, among other things, the arrest and conviction of two of the Board's key witneses for dynamiting the employer's facilities in an effort to force the employer to support the IBEW; attempts by Board agents and officials (including the trial examiner) to coerce the employer into withdrawing recognition from the independent union; and the effect of the IBEW's lawlessness on the employees. The Sixth Circuit found that the proffered evidence was material to the question of the substantive due process of Board proceedings as well as the basis of the Board's conclusion that the independent union was company-dominated. This Court agreed:

> "Dynamiting or display of force by either party has no place in the procedures which lead to reasoned judgments. The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence, and it is proper that courts and administrative bodies so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies." 318 U.S. at 29.

Weitzel was at the supplemental hearing before the Administrative Law Judge. He never asked to testify, he never asked to make a statement, and he never asked to put in documentary evidence that he now says is "material". (Tr. Vol. II, pp. 7, 10, 74, 78.) Yet the General Counsel gave him an opportunity to speak and the Administrative Law Judge listened to him. (Tr. Vol. II, p. 78.) He never suggested to the Administrative Law Judge that there was additional evidence he wanted in the record, witnesses he needed to call, or records that should be inspected. While he knew that he could be represented by separate counsel, he never stated that he wanted separate counsel, complained that he did not have separate counsel, or asked for time in which to have separate counsel appear on his behalf.

Following the Administrative Law Judge's adverse decision, Weitzel filed exceptions with the Board. (Tr. Vol. I, pp. 31-32.) He did not claim he had witnesses he had wanted to call and, other than an allusion to "evidence available to [him]" at the hearing, he did not suggest that he had material evidence that should have been included in the record. (Tr. Vol. I, p. 31.) He did not claim that he had been poorly represented by the General Counsel, and he did not ask the Board to reopen the hearing for *any* reason.

When the Board concurred with the Administrative Law Judge, Weitzel then secured an attorney and appealed to the Ninth Circuit. Nevertheless, neither he nor his attorney advised the Ninth Circuit that material evidence had been omitted from the proceedings below, that the General Counsel had handled the matter incompetently, or that a remand under § 10(e) of the Act was imperative. On the contrary, what he told the Ninth Circuit was that all of the evidence in the record supported his position that pipefitting work at Mare Island was not suitable interim employment, that Shell hadn't carried its burden of proving that it *was* suitable employment, that it was Shell's responsibility to call Weitzel as a witness and put Weitzel's records (assuming that there were any) into evidence, and that Shell's failure to call Weitzel as a witness or put Weitzel's papers into evidence compelled an inference to be drawn against it. (Petitioner's Opening Brief, pp. 22-25, 36-42, 44-45; Petitioner's Reply Brief, pp. 1-5.)

Weitzel now says that in his Reply Brief to the Ninth Circuit he "argued in the alternative that there ought to be a § 10(e) remand in line with the [Third Circuit's] decision . . . in *Swinick v. NLRB* (1975) 528 F.2d 796." (Petition for Writ of Certiorari, p. 8.) Even if he had done that, it would not have been appropriate to raise that issue for the first time by way of reply. But he didn't even do that. His Reply Brief speaks for itself. After spending twenty pages disputing Shell's analysis of the record, Weitzel remarked:

> "If this Court considers that the record is inadequate to determine whether the Mare Island job was more burdensome, if this Court concludes that the record should be augmented by testimony from Weitzel in this regard, it has the authority to order a new hearing for that purpose. *That is not Weitzel's argument here. We believe the record is ample to show that it was not 'substantially equivalent' to surveying and that, hence, Weitzel was not required in law to retain it.* (Point I Opening Brief). But if the Court deems otherwise, then Weitzel, as his Exceptions state, is ready to testify. . . .
>
> "If this Court considers it necessary to take additional evidence on any issue raised below, the issue of whether the interim job was 'substantially equivalent' to the surveying job denied him, the issue of whether, after leaving the interim job he did or did not seek other work, or any other issue, then we respectfully request that the Court consider this to be a motion for an order remanding the case to the Board for the purpose of taking additional evidence. *But we repeat, that we do not believe such an order to be necessary. There is ample recorded evidence here* to warrant and mandate reversal of the Board's decision and the entry of an order directing Shell to make restitution to him in accord with the Backpay Specifications." (Petitioner's Reply Brief, pp. 20-21, emphasis added.)

That is not an argument "in the alternative"—or in any other fashion—for remand under § 10(e) of the Act; that's not even a request for a remand, let alone a petition for remand setting forth the evidence to be adduced at a new hearing, the materiality of that evidence and the reasons it was not introduced at the original hearing. It is nothing more than a suggestion (followed immediately by a *disclaimer*) that if the Ninth Circuit felt the record inadequate to make a determination on the suitability of interim employment, then the Court could reopen the matter. The problem for Weitzel is that the Ninth Circuit agreed with him that it *wasn't* necessary to reopen the record. It found that there was ample evidence in the record to reach a decision,

and that evidence supported the Board's decision, not Weitzel's contentions.[6]

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6. Weitzel's suggestion that the facts of this case are similar to those in *Swinick v. NLRB,* 528 F.2d 796 (3rd Cir. 1975) and that, accordingly, the Ninth Circuit's decision conflicts with that of the Third Circuit is frivolous. In *Swinick,* the petitioner had specifically moved the court for a remand order under § 10(e); she had described in detail the additional evidence which she would proffer; and she had made an indisputable showing of materiality. The court also concluded that Swinick had reasonable grounds for not presenting her evidence earlier based on the fact that she had been involved in a complicated unfair labor practice proceeding (not a backpay proceeding); that she was unfamiliar with Board procedures; that she had been expressly assured by the General Counsel's office that it would handle the case; that she provided the General Counsel with a list of witnesses who should be called, including coworkers and union officials; *and* that at the hearing she vigorously attempted to present evidence:

> "A review of the transcript of the hearing demonstrates that petitioner, like the Board, felt that the General Counsel had failed to introduce key evidence. Consequently, petitioner sought to call her own witnesses and present her own evidence. Petitioner moved for a continuance in order to gain time to subpoena the union officials and to enforce the subpoena against Marlene Kimbell. The administrative law judge denied the motion. She also attempted to place in evidence the tape transcripts, but because she did not understand the procedure for authentication, she was unsuccessful. Finally, petitioner sought to place into evidence her time records but was also unsuccessful in this attempt. Under these circumstances, we conclude that there were reasonable grounds for the failure to adduce the aforementioned evidence at the hearing." (425 F.2d at 301, footnotes and citations omitted.)

As discussed, *supra* at page 9, Weitzel did none of these things. Indeed, far from being in conflict with *Swinick,* this case is so unlike *Swinick* that Judge Hufstedler, on whose lone dissent and suggestion of remand Weitzel now relies, stated at oral argument before the Court of Appeals in this case that the court did not need to hear argument on the *Swinick* issue because this case just wasn't a *Swinick* case and the court understood that.

II. The Court of Appeals Did Not Abuse Its Discretion Under § 10(e) Because There Was No Showing That Any Evidence Weitzel Had Was Material or That He Had Reasonable Grounds For Not Presenting It Sooner

Even assuming that Weitzel's comments in his Reply Brief could have been construed as a timely request for a remand under § 10(e) of the Act, the Court of Appeals did not abuse its discretion in declining to remand because Weitzel made no showing that the evidence he claimed he had was material to the issues involved or that there were any grounds—reasonable or otherwise—for not presenting it sooner.

(A) THERE WAS NO SHOWING THAT WEITZEL'S "ADDITIONAL EVIDENCE" WAS MATERIAL BECAUSE NO EVIDENCE WAS IDENTIFIED

Section 10(e) authorizes Courts of Appeals to remand a matter to the Board only if, among other things, the additional evidence sought to be introduced is material to the issues involved. *Southport Petroleum Co. v. National Labor Relations Board,* 315 U.S. 100, 104 (1942). In his briefs to the Ninth Circuit, and indeed in his Petition to this Court, Weitzel makes no showing that the additional evidence he says exists is material to this case. He simply concludes that it is because he lost: "It is obvious that the evidence which petitioner wanted to present was material as its very absence was the reason for the decision below." (Petition for Writ of Certiorari, p. 11.)

That's pure sophistry and Weitzel knows it. The fact that the Administrative Law Judge, the National Labor Relations Board and the Ninth Circuit decided against him doesn't mean that there was material evidence which someone (anyone) failed to place in the record. It can just as

easily be concluded that there wasn't any such evidence and *that's* why it isn't in the record.[7]

In any event, the evidence that Petitioner says he wanted to give is patently *not* material. He says that he wanted to testify (but didn't) that he worked at Shell as a land surveyor, that he worked at Mare Island as a pipefitter on repairs to submarines, that he was 56 years old at that time, and that pipefitting work is arduous. (Petition for Writ of Certiorari, p. 9, n.2.) None of this is material for the simple reason that it is already in the record.[8]

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7. Despite Petitioner's claims to the contrary (Petition for Writ of Certiorari, pp. 9, 10 and 11), neither the Board nor the Ninth Circuit criticized the General Counsel for failing to proffer "material and essential" evidence because there was nothing before them to suggest that such evidence existed.

8. Weitzel worked as a surveyor at Shell: Tr. Vol. II, pp. 60-61; App. D, p. 2, ll. 20-23. Weitzel worked as a pipefitter on Mare Island: Tr. Vol. II, p. 34; App. D, p. 1, ll. 39-40. Weitzel was 56 years old at the time of employment on Mare Island: Tr. Vol. II, pp. 74, ll. 15-18. Pipefitting work is strenuous: Tr. Vol. II, p. 65, ll. 16-18. The notion that repairs were being made to a "submerged" submarine is the fanciful invention of Weitzel's attorneys. What Weitzel told Roberts was that repairs were to be done to a submarine that had recently sunk, not that the repairs were being done while the submarine was "submerged." (Tr. Vol II, p. 17.) In fact, Weitzel's statements to the Board, the absence from the record of which he now purports to bemoan, showed that at the time he quit his job at Mare Island the work he was doing was neither arduous nor on a submarine, which may have been one of the reasons that both he and the General Counsel decided he should not take the stand. Weitzel, of course, knows that. His attorneys, if they did their homework, know it too. It was in this context that Shell pointed out (Shell's Brief to the Ninth Circuit, pp. 26-27) certain things Weitzel—now free from the rigors of cross examination—claimed as "facts" before the appellate court were not in the record. (See, reference to Shell's point at Petition for Writ of Certiorari, p. 11.)

(B) WEITZEL MADE NO SHOWING THAT HE HAD REASONABLE GROUNDS FOR NOT PRESENTING HIS "EVIDENCE" SOONER

Weitzel says that the reason he didn't testify and the reason he didn't submit his documentary evidence was because the General Counsel mishandled the case. Citing his January 26, 1975 letter to the Board, Weitzel laments that "NLRB officials informed [him] that it was unnecessary to present witnesses and that the trial judge would not allow any testimony;" that they explained to him that "if anything brought up by [Shell] was in need of refutation, a continuance could be, and would be requested, and the necessary witnesses could be called for further sessions;" that he had compiled and documented "pages of information" on his reasons for leaving Mare Island which he'd given to the NLRB office; that no one called him to testify regarding Roberts' "false testimony;" and that if he had been allowed to testify he would have given "true and accurate" testimony that differed from that of Shell's witnesses, Sheridan and Listoe. (Petition for Writ of Certiorari, pp. 7-8.)[9] Weitzel says that his adds up to "being steamrollered by inadequate government counsel who either put the interests of their agencies ahead of the individuals for whom they assume an adversary role or ignore the individuals' interests because they do not sense a responsibility to protect them." (Petition for Writ of Certiorari, p. 10.) We suggest that, on the contrary, all that after-the-fact hyperbole, unsupported by any specifics about who those witnesses would have been and what that evidence would have shown, adds up to nothing at all.

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9. As noted previously, p. 5, n. 4, despite Petitioner's penchant for citing this letter, the Board refused to accept it as a bill of exceptions and returned it to Weitzel. Petitioner's formal exceptions dated February 7, 1975, which were accepted by the Board, contain none of these assertions.

Weitzel's claim that NLRB officials told him he couldn't have witnesses at the hearing is preposterous. What he said in his letter to the Board was:

> "About three weeks before the hearing I began to arrange for possible witnesses to be present at the hearing in order to support my position if I were called to testify. When Region 20 officials became aware of this I was informed this was not only unnecessary, but the judge would probably not allow any such *testimony as I had in mind anyway, that testimony concerning the specific matter before the judge—the validity or invalidity of the backpay specification—would be all that would be permitted.*" (Tr. Vol. I. p. 33, emphasis added.)

There is nothing incorrect, misleading or improper about that. To this day, there hasn't been the slightest suggestion that the "possible witnesses" to whom Weitzel alluded in fact had anything to contribute to a backpay proceeding.

Nor does the fact that the General Counsel elected not to call Weitzel as a witness or put in the information Weitzel says he compiled lend credence to his charge of gross incompetence. There can be many reasons for not calling Weitzel to the stand or putting in the information, not the least of which may have been the General Counsel's belief that Weitzel and his information had nothing to offer in the way of probative evidence or that he didn't want Weitzel subject to cross-examination.[10] Be that as it may, Weitzel directly addressed the Administrative Law Judge on several occasions throughout the hearing, including a colloquy

10. For example, Messrs. Sheridan and Listoe testified to the general availability of pipefitter openings during the entire backpay period. The General Counsel having reviewed all of the documents Weitzel had presented to the Board conceded that Weitzel was not looking for pipefitter's work and Weitzel did not object that that was untrue. (Tr. Vol. II, p. 68.) Thus any evidence that Weitzel had that he was looking for other work was irrelevant to the theory on which this case was tried.

off the record which his Petition suggests was in rebuttal to testimony from two of Shell's witnesses (Petition for Writ of Certiorari, p. 8), but which his January 26, 1975 letter makes clear consisted of a discussion of the difficulties in getting the Social Security Administration to credit backpay to his account. (Tr. Vol. I, pp. 36-37.) He never asked to testify, offered any of the "evidence" he now repeatedly alludes to, suggested that witnesses be called, or requested a continuance.

What Weitzel is really doing here is second-guessing a tactical decision made by the General Counsel, a decision which, from all appearances at the hearing, he concurred in at the time. Even assuming that a litigant's strategical regrets should be grounds for the issuance of a writ of certiorari, Weitzel cannot be heard to complain when he and his attorney cheerfully endorsed the General Counsel's decision all the way through the Ninth Circuit:

> *"In a backpay proceeding the sole burden on the General Counsel is to show gross amounts of back pay due a discriminatee. Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 534 (1943). If the discriminator pleads the affirmative defense of willfull loss by failure to retain substantially equivalent interim employment, it is its burden to prove it by a preponderance of the evidence. Hence, the procedure uniformly followed in a backpay proceeding is that General Counsel puts into evidence the backpay Specification and he then rests. If the employer then fails to meet its burden of proving willfull loss, an order of backpay issues. The General Counsel *never* has been required to put the discriminatee on the stand. The Respondent, on the contrary, always has, and when it fails to, inferences adverse to it are drawn from that failure.
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> "But, because a backpay hearing is not a strictly adversary proceeding, but a truth-finding one as well, the Board, as a 'public service' also *produces* the discriminatee. It brings him to the hearing. But it does

not put him on the stand. It makes him available for the discharging employer to examine him (where it can make him available), but it has no burden to examine him, and it doesn't." (Petitioner's Opening Brief to the Ninth Circuit, pp. 44-45, emphasis in the original.)

Weitzel accepted the strategy at the hearing, until he lost. He defended that strategy before the Ninth Circuit, until he lost. Now he argues to this Court that it was all the General Counsel's fault. However great the General Counsel's burden of "public responsibility" (Petition for Writ of Certiorari, p. 14), that does not mean that each time a charging party loses he is free to pass the buck to the General Counsel and start again. "If I don't win this way, please let me have a second chance to try another" may be the wish of all unsuccessful litigants; it is not a sufficient basis on which to request issuance of a writ of certiorari.

III. A Court Does Not Have To Expressly Pass On a Request for a Remand Under § 10(e) When No Such Request Is Properly Made

With respect to Petitioner's concern over whether or not a Court of Appeals must expressly pass upon remand requests under § 10(e) of the Act or whether such requests may be denied *sub silentio*, under the circumstances of this case, the question is clearly academic. Since no request for remand under § 10(e) was ever made by Weitzel except perhaps in the most off hand and indifferent manner, he can hardly complain if the Ninth Circuit accorded his "request" no greater significance than he did himself.[11]

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11. Even if the issue had some substance, the answer seems clear. There is nothing in the Act nor in the concept of due process that requires a court to discuss its denial of a remand application under § 10(e) of the Act when it already has expressed its reasons for enforcing a Board order. *Southport Petroleum Co. v. National Labor Relations Board*, 315 U.S. 100, 104 (1942).

CONCLUSION

Respondent/Intervenor Shell Oil Company submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

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Respectfully submitted,

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